



DATE: APRIL 17, 1990  
CASE NO. 89-INA-9

IN THE MATTER OF

TEH-TUNG STEAMSHIP (HOUSTON), INC.  
Employer

on behalf of

YEE TSENG  
Alien

Appearance: Scott Glabman, Esquire  
For the Certifying Officer

BEFORE: Brenner, Guill, Litt, Marcellino, Marden, Murrett, Romano, and Silverman  
Administrative Law Judges

LAWRENCE BRENNER  
Administrative Law Judge

### DECISION AND ORDER

On January 30, 1990, a panel of the Board affirmed the Certifying Officer's (C.O.) denial of alien labor certification in this case. On February 16, 1990, the C.O. timely filed a "Petition for En banc Review" by the full Board. The Employer has not filed a response to the petition. The C.O. correctly noted that this case arises in the Fifth Circuit and raises the issue whether the U.S. applicants can perform the job duties. The C.O. now requests that under Ashbrook-Simon-Hartley v. McLaughlin, 863 F.2d 410 (5th Cir.1989), we remand this case to her to consider whether the U.S. applicants can perform the job duties.

In Ashbrook, the Court of Appeals for the Fifth Circuit held that the Department of Labor "cannot narrow its inquiry to the single question of whether the U.S. worker applicant has a certain number of years of education, training, or experience," rather, it must "inquire whether a domestic applicant is able to perform the job duties." Id. at 415-416. In that case, the employer sought to fill the position of design engineer supervisor. The employer required two years experience in the job offered or four years experience as a mechanical design engineer. A U.S. worker was rejected because although he had four years experience as a mechanical design engineer, the employer concluded that he was unable to perform the job duties. The administrative law judge held that since the U.S. worker met the stated minimum requirements, the employer did not reject him for lawful, job-related reasons. The Court of Appeals reversed,

holding that the Department of Labor cannot "ignore the job duties listed by the employer when determining whether the employer has a job-related reason for rejecting a domestic applicant." Id. at 416.

The holding of the panel decision in this case was that each of the three U.S. applicants possessed at least one of the Employer's alternative requirements: one year of experience as an engineering or marine superintendent. These alternative experience requirements specified by the Employer are somewhat confusing, because they overlap its alternative experience requirement of one year in the job offered, which is "Operations Manager/Marine Superintendent". The panel did not rule on whether the U.S. applicants had the experience in the job offered. The panel decision also discussed one U.S. applicant's experience in the job duties, and the fact that there was no evidence that the alien had any experience in the job offered prior to being placed in that job by the Employer. However, the panel did not decide whether a U.S. applicant or the alien could perform the job duties.

In the posture of this case, we conclude it is appropriate to grant the C.O.'s request and remand the case to her to determine in the first instance whether a U.S. applicant is able to perform the job duties. Also pursuant to Ashbrook, the C.O. may inquire as to whether the alien could perform the job duties at the time he was hired by the Employer for the same or similar jobs. If the C.O. again proposes to deny certification, she shall issue a new Notice of Findings giving the Employer a chance to rebut her findings. This approach is consistent with the Board's decision in Fifth Circuit cases. Ron Hartgrove, 88-INA-302 (May 31, 1989). As a prerequisite to the C.O.'s consideration on remand, the Employer shall, within thirty days of service of this Decision, inform the Dallas C.O. if it is still seeking labor certification in this case.

#### ORDER

The Final Determination of the Certifying Officer and the panel's decision denying certification are hereby VACATED, and the matter is REMANDED for further action consistent with this decision.

For the Board:

LAWRENCE BRENNER  
Administrative Law Judge

LB/gaf